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COLUMBIA LAW REVIEW

VOL. XXIV

NOVEMBER 1924

NO. 7

NEGLIGENCE IN THE LAW OF BILLS AND NOTES

To what extent, if at all, should negligent conduct by a party to a bill or note, affect his liability thereon? This problem presents itself in various forms. A person may sign his name to an instrument, in fact negotiable, believing it to be a receipt or simple contract. A genuine signature may be procured by the fraudulent use of carbon paper or a rubber stamp. One may knowingly execute a negotiable instrument, complete as to formal requisites, but so drawn as to permit its subsequent alteration by the insertion of words and figures therein without erasures, or by the filling of blanks providing for the rate of interest, a place of payment or attorneys fees or by the detachment of qualifying clauses. The instrument may be so executed that its alteration by erasures is rendered relatively easy, as when drawn with pencil. Again there may be negligent conduct by the maker with respect to his custody of the instrument, either in complete or incomplete form, as a result of which it may find its way into the hands of an innocent purchaser without intentional delivery by the party executing it. Or, more remotely analogous, an instrument may be intentionally delivered to one under mistake as to the identity of the transferee induced by fraud, or it may be transmitted through the mails to one of the same name as the intended payee as the result of an incorrect address. In all of these cases there may be negligent conduct with respect to the act of affixing the signature, or the drawing of the body of the instrument, or in retaining custody of it prior to delivery, or in the act of making delivery. Should the liability of the maker to the holder in due course be made to turn in any, or all, of these cases and others of similar nature, upon the negligent conduct?

The answer depends upon the view taken as to what are the bare requisites of liability of a party to a bill or note to the party with whom he deals and as to what powers are conferred upon him and subsequent holders, or even parties other than holders, to subject the maker or drawer or other party to a different liability in favor of the holder in due course, and as to the underlying reasons therefor. As far as the liability of the maker to the party with whom he deals is

concerned, his liability is, of course, essentially contractual; but there is this fundamental difference, the bill or note is regarded, in a fairly real sense, as the thing itself, as property, rather than as the mere written evidence of contractual relations. The reason for this is that negotiable paper must be endowed with such legal characteristics as will enable it to function as an effective substitute for money. By giving it a property as well as a contract status this object is attained. Accordingly, as between immediate parties liability flows (1) from the act of signing the instrument drawn in compliance with a series of detailed rules designed to insure certainty in its several aspects, and (2) from the act of delivery. Consideration, of course, is an additional requisite, although procedurally it is a matter of defense. Other matters of defense in actions on simple contracts are, with some variations, regarded as defenses in actions on bills and notes, but there are some innovations, for example, the doctrine of renunciation.

In fixing the liability to the holder in due course the shutting out of the defenses which would attach to the instrument as a contract and the equities of ownership which might be acquired in it as a species of property by parties in and outside the chain of title becomes of prime importance. If the instrument is to perform some of the functions of money, prospective purchasers may most readily be induced to take it if they are permitted to assume that, ordinarily, the instrument represents existing liabilities of the parties whose names appear thereon. There is no particular legal difficulty involved in establishing the policy of cutting off the ordinary defenses of fraud, lack of consideration, breach of contract, payment before maturity and the like, but in determining the circumstances under which a party whose name appears upon an instrument may succeed in an action brought by a holder in due course the solution of particular controversies becomes fairly difficult. In reality a party has no defenses as against an innocent purchaser. He may succeed, however, in a particular action for one of three reasons: (1) because the instrument sued on, although his contract, is vitiated by other rules of law, as when it is declared void for illegality; (2) because the plaintiff is unable to establish that the instrument sued on is the contract of the defendant; and (3) because the plaintiff is unable to prove that he is the person to whom the obligation runs. As a matter of convenience the first two groups are sometimes referred to as comprising the real defenses.

The negotiable instrument, possessing as it does, the attributes of a contract and certain characteristics of property, will come into existence as a result of the observance of the rules governing the formation of contracts and the rules having to do with the acquisition of rights with respect to property. The act of execution, *i. e.*, the drawing of it

in the prescribed form and the signing, features the instrument as a contract; the act of delivery calls attention to its aspects as a species of property. In the typical case there is no particular difficulty in determining whether the instrument in question has been executed and delivered. But acts of execution and of delivery fade out by almost imperceptible degrees to points where there is a total absence of one or both of these requisites, and the plotting of the lines or curves between them becomes difficult.

One method of solving the border-line cases would consist in the strictly logical application of the principles of contracts and property to the situation presented by the bill or note. But as against the holder in due course these rules, as a matter of historical development, have undergone modifications, and, from a standpoint of the functions of commercial paper, must be modified to meet the needs of business. The rules as to what shall constitute the acts of execution and of delivery, controlled as they are fundamentally by contract and property analogies and by the desire to encourage the ready circulation of negotiable paper by the policy of cutting off equities and defenses, have, in their application, developed a diversity in result, due in some degree to the extent to which a particular court is influenced by tort and equity concepts, and in part to a tendency, of somewhat ill-defined origin, of some courts to give the benefit of the doubt to the maker, and of other courts to give it to the innocent purchaser.

The problem in most instances is the same under the Negotiable Instruments Law as it was at common law.¹ The Act requires that the instrument be in writing and signed by the maker or drawer, defines the consequences of forgery but does not prescribe what constitutes a genuine or forged signature. The legal effect of material alterations is defined, but the nature of the act which is to operate as a material alteration is not indicated. The effect of delivery and non-delivery of complete and incomplete instruments is dealt with, but the Act does not indicate what facts may be taken into consideration in determining what constitutes delivery. The same may be said with respect to fraud. It may be remarked in passing that this situation is frequently repeated throughout the whole field of the law. A readily workable rule of law consists in the assertion that a definite legal effect results from definitely indicated operative facts, but generalizations of rules and principles, whether of legislative or judicial origin, often define a legal relation merely by describing the fact, or by indicating the legal effect, the remaining term being indistinctly drawn. The following statement is made to indicate what facts may be considered in determining whether a party is liable to the holder in due course.

¹N. I. L. §§ 1, 23, 124, 125, 14, 15, and 16.

Where a party executes a bill or note believing it to be a receipt, simple contract or other instrument not negotiable, the courts in this country, largely under the influence of *Foster v. MacKinnon*,² have made the result turn, not on the issue of the genuineness of the signature, but on the issue of intention to execute, or when absent, upon negligence in not ascertaining the facts.³ As to what constitutes negligence, the majority of the cases hold that where the party executing the paper is able to read what is submitted for his signature but does not do so and relies upon the statement or purported reading by the

² (1869) L. R. 4 C. P. 704.

³ California—*Bedell v. Herring* (1888) 77 Cal. 572, 20 Pac. 129.

Georgia—*Grooms v. Olliff & Co.* (1894) 93 Ga. 789, 20 S. E. 655.

Illinois—*Woods v. Hynes* (Ill. 1833) 1 Scam. 103; *Mulford v. Shepherd* (Ill. 1839) 1 Scam. 583; *Latham v. Smith* (1867) 45 Ill. 25; *Murray v. Beckwith* (1868) 48 Ill. 391; *Taylor v. Atchison* (1870) 54 Ill. 196; *Leach v. Nichols* (1870) 55 Ill. 273; *Richardson v. Schirtz* (1871) 59 Ill. 313; *Mead v. Munson* (1871) 60 Ill. 49; *Sims v. Bice* (1873) 67 Ill. 88; *Champion v. Ulmer* (1873) 70 Ill. 322; *Anderson v. Warne* (1873) 71 Ill. 20; *Hubbard v. Rankin, Sr.* (1873) 71 Ill. 129; *Homes v. Hale* (1874) 71 Ill. 552; *Hewitt v. Jones* (1874) 72 Ill. 218; *Vanbrunt v. Singley* (1877) 85 Ill. 281; *Auten v. Gruner* (1878) 90 Ill. 300. Indiana—*Cline v. Guthrie* (1873) 42 Ind. 227; *Nebeker v. Cutsinger* (1874) 48 Ind. 436; *Kimble v. Christie* (1876) 55 Ind. 140; *Maxwell v. Morehart* (1879) 66 Ind. 301; *Fisher v. Von Behren* (1880) 70 Ind. 19; *Woollen v. Whitacre* (1880) 73 Ind. 198; *Ruddell v. Dillman* (1881) 73 Ind. 518; *Webb v. Corbin* (1881) 78 Ind. 403; *Williams v. Stoll* (1881) 79 Ind. 80; *Yeagley v. Webb* (1882) 86 Ind. 424; *Mitchell v. Tomlinson* (1883) 91 Ind. 167; *Palmer v. Poor* (1889) 121 Ind. 135, 22 N. E. 984; *Lindley v. Hofman* (1899) 22 Ind. App. 237, 53 N. E. 471; *Home Nat. Bank v. Hill* (1905) 165 Ind. 226, 74 N. E. 1086.

Iowa—*McDonald v. Muscatine Nat. Bank* (1869) 27 Iowa 319; *Caulkins v. Whisler* (1870) 29 Iowa 495; *Douglass v. Matting* (1870) 29 Iowa 498; *Wright, Dryden & Co. v. Flinn* (1871) 33 Iowa 159; *Fayette County Savings Bank v. Steffes* (1880) 54 Iowa 214, 6 N. W. 267; *National Bank v. Zeims* (1894) 93 Iowa 140, 61 N. W. 483; *Green v. Wilkie* (1896) 98 Iowa 74, 66 N. W. 1046; *First Nat. Bank v. Hall* (1915) 169 Iowa 218, 151 N. W. 120.

Kansas—*Ort v. Fowler* (1884) 31 Kan. 478, 2 Pac. 580.

Maine—*Abbott v. Rose* (1873) 62 Me. 194; *Nichols v. Baker* (1883) 75 Me. 334; *Breckenridge v. Lewis* (1892) 84 Me. 349, 24 Atl. 864; *National Bank v. Hill* (1907) 102 Me. 346, 66 Atl. 721.

Massachusetts—*Trambly v. Ricard* (1881) 130 Mass. 259; *Freedley v. French* (1891) 154 Mass. 339, 28 N. E. 272.

Michigan—*Gibbs v. Linabury* (1871) 22 Mich. 479; *Anderson v. Walter* (1876) 34 Mich. 112; *Soper v. Peck* (1883) 51 Mich. 563, 17 N. W. 57; *First Natl. Bk. of Sturgis v. Deal* (1885) 55 Mich. 592, 22 N. W. 53; *Beard v. Hill* (1902) 131 Mich. 246, 90 N. W. 1065; *Van Slyke v. Rooks* (1914) 181 Mich. 88, 147 N. W. 579.

Minnesota—*Mackey v. Peterson* (1882) 29 Minn. 298, 13 N. W. 132; *Ward v. Johnson* (1892) 51 Minn. 480, 53 N. W. 766; *Yellow Medicine County Bk. v. Tagley* (1894) 57 Minn. 391, 59 N. W. 486; *Hinkley v. Freich* (1910) 112 Minn. 239, 127 N. W. 940; *Stevens v. Pearson* (1917) 138 Minn. 72, 163 N. W. 769.

Missouri—*Briggs v. Ewart* (1873) 51 Mo. 245; *Martin v. Smylee* (1874) 55 Mo. 577; *Corby, Ex'x v. Weddle* (1874) 57 Mo. 452; *Shirts v. Overjohn* (1875) 60 Mo. 305; *Cowgill v. Petifish* (1892) 51 Mo. App. 264; *First Nat. Bank v. Hall* (1908) 129 Mo. App. 286, 108 S. W. 633.

Nebraska—*First Nat. Bank v. Lierman* (1876) 5 Neb. 247; *Dinsmore & Co. v. Stimbert* (1882) 12 Neb. 433, 11 N. W. 872; *Willard v. Nelson* (1892) 35 Neb. 651, 53 N. W. 572; *Shenandoah Nat. Bank v. Gravatte* (1903) 4 Neb. Unof. 591, 95 N. W. 694; *Boithell v. Miller* (1910) 87 Neb. 835, 128 N. W. 628.

party with whom he is dealing, he will usually be held negligent.⁴ The question is not usually considered as one of law, although in a few cases it has been so treated.⁵ It was once held in Michigan that, as a matter of law, the signer was not negligent by signing under such circumstances.⁶ Where the maker is not able to read, because of illiteracy or otherwise, there being no third party present or readily available, he will not be negligent in relying upon a statement by the adverse party as to the contents of the writing signed by him, but if a third party is present or readily available, who is not associated with the adverse party, the maker will be deemed negligent if he does not request such third party to inform him of the contents of the paper.⁷ The determination of the issue of negligence is also more or less influenced by the intention of the maker. Apparently the maker is under a lesser duty of care when he believes that he is signing a paper represented as not being the evidence of any obligation than in those cases where he understands that he is signing some contract obligation but is misled as to its negotiable character.⁸ Where the signature is obtained by the fraudulent use of carbon paper or a rubber stamp, the issue has been held to turn on the question of negligence in the act of signing or in the negligent custody of the rubber stamp.⁹

New Hampshire—*Bank v. Smith* (1875) 55 N. H. 593.

New York—*Whitney v. Snyder* (N. Y. 1870) 2 Lans. 477; *Chapman v. Rose* (1874) 56 N. Y. 137; *Natl. Exchange Bank v. Veneman* (N. Y. 1887) 43 Hun 241; *Marden v. Dorthy* (1899) 160 N. Y. 39, 54 N. E. 726.

North Dakota—*Porter v. Hardy* (1901) 10 N. Dak. 551, 88 N. W. 458.

Ohio—*De Camp v. Hanna, Exr* (1876) 29 Ohio St. 467; *Ross v. Doland* (1876) 29 Ohio St. 473; *Winchell v. Crider* (1876) 29 Ohio St. 480; *Perkins v. White* (1881) 36 Ohio St. 530.

Oklahoma—*First Nat. Bank of Watonga v. Wade* (1910) 27 Okla. 102, 111 Pac. 205.

Oregon—*Brown v. Feldwert* (1905) 46 Ore. 363, 80 Pac. 414.

Pennsylvania—*Brown v. Reed* (1875) 79 Pa. St. 370.

Rhode Island—*Millard v. Barton* (1882) 13 R. I. 601.

Washington—*Yakima Valley Bank v. McAllister* (1905) 37 Wash. 566, 79 Pac. 1119.

Wisconsin—*Walker v. Ebert* (1871) 29 Wis. 194; *Kellogg v. Steiner* (1872) 29 Wis. 626; *Butler v. Carns* (1875) 37 Wis. 61; *Griffiths v. Kellogg* (1876) 39 Wis. 290; *Bowers v. Thomas* (1885) 62 Wis. 480, 22 N. W. 710; *Keller v. Schmidt* (1899) 104 Wis. 596, 80 N. W. 935; *Dowagiac Mfg. Co. v. Schroeder* (1900) 108 Wis. 109, 84 N. W. 14; *Keller v. Ruppold* (1902) 115 Wis. 636, 92 N. W. 364; *Aukland v. Arnold* (1907) 131 Wis. 64, 111 N. W. 212.

The above cases were reviewed in Britton, *Fraud in the Inception of Bills and Notes* (1924) 9 Cornell Law Quart. 138.

⁴ *Nebeker v. Cutsinger*, *supra*, footnote 3; *Douglass v. Matting*, *ibid.*; *Freedley v. French*, *ibid.*; *Dowagiac Mfg. Co. v. Schroeder*, *ibid.*

⁵ *Ort v. Fowler*, *ibid.*

⁶ *Anderson v. Walter*, *ibid.*; *First Nat. Bk. of Sturgis v. Deal*, *ibid.* These cases were virtually overruled by *Van Slyke v. Rooks*, *ibid.*

⁷ *Lindley v. Hofman*, *ibid.*; *Natl. Exchange Bank v. Veneman*, *ibid.*

⁸ *Natl. Exchange Bank v. Veneman*, *ibid.*, p. 245.

⁹ *Yakima Valley Bank v. McAllister*, *ibid.*; *Maurmair v. Nat. Bank* (Okla. 1916) 158 Pac. 349; *Robb v. Pa. Co.* (1898) 186 Pa. 456, 40 Atl. 970.

That phase of the rule which frees the maker from liability in cases of non-negligent execution, the maker not knowing what he signs, has been repudiated in West Virginia. After reviewing this line of cases the court declared:

"It is feared that some courts, in their earnest desire to protect the citizen from the frauds of venders of patents, have unwittingly struck the law merchant a fearful blow."

The court adopted the rule that the innocent purchaser should recover "unless at the time it was purchased by him, it was absolutely void, . . . although the maker was induced by fraud to sign such note, and in such case the question of negligence in the maker forms no legitimate enquiry. This rule is absolutely necessary to the protection of innocent holders of commercial paper."¹⁰

The type of case which has occasioned the most controversy is that which involves the rule in *Young v. Grote*,¹¹ where the English Court of Common Pleas held that the drawee bank might properly debit the account of the drawer for the full amount of a check so negligently drawn as to permit its subsequent alteration by the insertion of words and figures therein without erasures. The case was long a subject of controversy in the English courts. Its application in favor of the holder in due course as against the acceptor of a bill was denied by the House of Lords¹² and a few years later, on authority of this case, the Privy Council repudiated *Young v. Grote* and denied its application even in favor of the drawee bank against the negligent drawer.¹³ Following this tendency the English Court of Appeal denied the authority of the case altogether,¹⁴ but this decision was reversed by the House of Lords,¹⁵ thus reestablishing the rule in *Young v. Grote* but confining its application strictly to the banker-depositor relation. In the course of his opinion Lord Finley emphasized this limitation and declared that "the relation between banker and customer is that of debtor and creditor, with a superadded obligation on the part of the

¹⁰ *Tower v. Whip* (1903) 53 W. Va. 158, 44 S. E. 179; see *Bank of Parkersburg v. Johns* (1883) 22 W. Va. 520, 535. The same view has apparently been adopted in *Rowland v. Fowler* (1879) 47 Conn. 347; also in *Mackey v. Peterson*, *supra*, footnote 3; but subsequently changed by statute, see Minn. Gen. Stat. (1913) § 6015, and *Yellow Medicine County Bk. v. Tagley*, *supra*, footnote 3.

¹¹ (1827) 4 Bing. 253.

¹² *Scholfield v. The Earl of Londesborough* [1896] A. C. 514. Since the negligent execution was the act of the drawer this case does not squarely deny the right of the holder in due course to recover from the negligent party. This question appears not to have been squarely presented, but, in view of the later cases, it is unlikely that *Young v. Grote* would be so applied. See also *Imperial Bank of Canada v. Bank of Hamilton* [1903] A. C. 49.

¹³ *Colonial Bank of Australasia v. Marshall* [1906] A. C. 559.

¹⁴ *MacMillan v. London Joint Stock Bank* [1917] 2 K. B. 439.

¹⁵ [1918] A. C. 777.

banker to honour the customer's cheques if the account is in credit. A cheque drawn by a customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque. It is beyond dispute that the customer is bound to exercise reasonable care in drawing the cheque to prevent the banker being misled. If he draws the cheque in a manner which facilitates fraud, he is guilty of a breach of duty as between himself and the banker and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty. . . . The sole ground upon which *Young v. Grote* was decided by the majority of the Court of Common Pleas was that Young was a customer of the bank owing to the bank the duty of drawing his cheque with reasonable care."

It is a little strange that this situation has not arisen more frequently in the courts of this country. No decision has been found which denies this right of the drawee bank and there is some authority for its existence even in those states which deny the right of the holder in due course to recover in similar circumstances.¹⁶ Those courts which protect the innocent purchaser would surely protect the drawee. There is also some authority for the right of the drawee bank to debit the account of the drawer upon an incomplete instrument not delivered but completed and negotiated without authority.¹⁷ The two cases are fairly analogous. It is not improbable that in both cases the right of the drawee to charge the drawer's account will become generally recognized.

The majority of the cases in this country have involved the right of the holder in due course to recover from the negligent maker or

¹⁶ The court in *Fordyce v. Kosminski* (1886) 49 Ark. 40, 44, 3 S. W. 892, in a dictum, seems to confine the rule to the banker-depositor relation, for it says: "The customer would be entitled to recover from the banker the amount paid on such a check, the banker having no voucher to justify the payment; the banker, on the other hand, would be entitled to recover against the customer for the loss sustained through the negligence of the latter. Possibly, to prevent circuity of action the right of the banker to indemnity in respect of the loss so brought about would afford him a defense in an action by the customer to recover the amount."

And the court in *Greenfield Savings Bank v. Stowell* (1877) 123 Mass. 196, 202, says: "...If the negligence of the customer affords opportunity to a clerk or other person in his employ to add to the terms of a draft and thereby mislead the banker, the customer may well be held liable to the banker."

¹⁷ In *Trust Co. of America v. Conklin* (1909) 65 Misc. 1, 119 N. Y. Supp. 367, where it was held that the drawee might debit the account of the drawer upon a check which was stolen from the drawer while in incomplete state, the court said: "We may dismiss entirely the question whether the defendant (drawer) would be liable to a *bona fide* holder for value; the question before us is entirely one concerning the duties of a depositor to his bank. ...he owed a duty to the bank to put his signature upon a blank check only for the purpose of directing it to pay out the money and, however slight the risk, the depositor is the person who has assumed it, ...and by virtue of his contractual relation to the bank, he is now bound to pay back to the bank the money which it has paid out."

drawer. The cases fall roughly into four groups: (1) where the instrument is complete in form, containing no formal blank spaces, but so executed as to permit subsequent alteration by the insertion of words, figures and clauses without erasures; (2) where the instrument is complete as to formal requisites, but containing formal blank spaces for the insertion of interest clauses, places of payment, attorneys' fees, etc.; (3) where the instrument contains qualifying clauses so situated that they may be detached without mutilating the formal requisites of the instrument; and (4) where the instrument is altered by erasures.

Where the instrument is so drawn as to permit the alteration of the sum payable by inserting words and figures, the courts in five states have allowed the holder in due course to recover,¹⁸ while in seven states,¹⁹ possibly eight,²⁰ a contrary result has been reached. Where the alteration consists in the insertion of a clause providing for interest or a place of payment, not in a formal blank space but at the end of the note above the signature or between the lines, the courts appear to hold uniformly that the maker is not liable to the innocent holder.²¹

¹⁸ Alteration of the sum payable, by insertions, maker liable to the holder in due course: *Yocum v. Smith* (1871) 63 Ill. 321; *Coyne v. Dooley* (1889) 34 Ill. App. 26 (rule not applied because the maker's illiteracy freed him from the charge of negligence); *Merritt v. Boyden* (1900) 93 Ill. App. 613; *Bank of Commerce v. Halderman* (1900) 109 Ky. 222, 58 S. W. 222 (rule not applied because the issue was not raised by the pleadings); *Hackett v. First Nat. Bank* (1902) 114 Ky. 193, 70 S. W. 664; *Isnard v. Torres* (1855) 10 La. Ann. *103; *Helwege v. Hibernia Nat. Bank* (1876) 28 La. Ann. *520; *Trigg v. Taylor* (1858) 27 Mo. 245 (rule recognized but not applied because plaintiff's case not tried on negligence theory); *Scotland Co. Nat. Bank v. O'Connell* (1886) 23 Mo. App. 165; *Garrard v. Haddan* (1870) 67 Pa. 82.

In *National Bank v. Nolting* (1897) 94 Va. 263, 267, 26 S. E. 826, a case of material alteration by erasures and substitutions, the maker being held not liable, the court intimated that the issue of negligent execution would be inquired into in a proper case, for the court observed that "In the case at bar, it is not pretended that there was any negligence in drawing the check."

¹⁹ Alteration of the sum payable, by insertions, maker not liable to the holder in due course—*The Knoxville Nat. Bank v. Clark* (1879) 51 Iowa 264; *Bank v. Wangerin* (1902) 65 Kan. 423, 70 Pac. 330; *Burrows v. Klunk* (1889) 70 Md. 451, 17 Atl. 378; *Greenfield Savings Bank v. Stowell*, *supra*, footnote 16; *Cape Ann Nat. Bank v. Burns* (1880) 129 Mass. 596; *Goodman v. Eastman* (1828) 4 N. H. 455; *Flannagan v. Nat. Union Bank* (City Ct. N. Y. 1888) 2 N. Y. Supp. 488; *Nat. Exchange Bank v. Lester* (1909) 194 N. Y. 461, 87 N. E. 779; *Searles v. Seipp* (1895) 6 S. Dak. 472, 61 N. W. 804.

²⁰ *Fordyce v. Kosminski*, *supra*, footnote 16. Check for \$8.40 changed to \$80.40. This decision, however, in its result is consistent with the opposing rule, upon the ground that the failure of the drawer to so draw the instrument as to prevent the insertion of the letter "y" after the word "eight" did not constitute negligence. So held in *Leas v. Walls* (1882) 101 Pa. 57, where a note for eight dollars was made to read "eighty dollars," the holder in due course failing to recover, although in Pennsylvania the opposing rule has been adopted. See also *Société Generale v. Metropolitan Bank* (1873) 27 L. T. 849.

²¹ Insertions and interlineations not in formal blank spaces, maker not liable to the holder in due course—*Exchange Nat. Bank v. Little* (1914) 111 Ark. 263, 164 S. W. 731; *Sudler v. Collins* (Del. 1863) 2 Houst. 538; *Haley v. Vandiver* (1910) 8 Ga. App. 78, 68 S. E. 651; *Schnewind v. Hackett, Administrator* (1876) 54 Ind. 248; *The Kingston Savings Bank v. Bosserman* (1892) 52

It is quite possible to dispose of these latter cases on the ground that the space in which the insertion was made was not negligently left, it being quite impracticable, from a business standpoint, for the maker to cross out every square inch of blank space on the instrument.²² Where, however, the blank for interest or the place of payment has been filled, but spaces so left between the words as to permit the insertion of other words, the same conflict of authority exists.²³

When an instrument is issued which contains formal blanks, the filling of which is essential to its existence as negotiable paper, and the same is delivered or intrusted for delivery and later completed in a manner not authorized, the question of material alteration does not enter and the holder in due course is allowed to recover.²⁴ But where the instrument is complete as to essentials, but contains formal blanks for the insertion of clauses providing for interest or for a place of payment, there is a conflict as to whether the filling of such blanks is to be regarded as a material alteration. Some courts hold the maker liable,²⁵ others do not.²⁶ The courts which permit recovery are not

Mo. App. 269; *Waterman v. Vose* (1857) 43 Me. 504; *Draper v. Wood* (1873) 112 Mass. 315; *Holmes v. Trumper* (1871) 22 Mich. 427; *Bradley v. Mann* (1877) 37 Mich. 1; *Sinmons v. Atkinson* (1892) 69 Miss. 862, 12 So. 263; *Ivory v. Michael* (1863) 33 Mo. 398; *Presbury v. Michael* (1863) 33 Mo. 542; *Capital Bank v. Armstrong* (1876) 62 Mo. 59; *Iron Mountain Bank v. Murdock & Armstrong* (1876) 62 Mo. 70; *Bruce v. Wescott* (N. Y. 1848) 3 Barb. 374; *McGrath v. Clark* (1874) 56 N. Y. 34; *Mt. Morris Bank v. Lawson* (Com. Pl. 1894) 31 N. Y. Supp. 18; *Farmers' & Merchants' Bank v. Novich* (1896) 89 Tex. 381, 34 S. W. 914; *Gettysburg Nat. Bank v. Chisolm* (1895) 169 Pa. St. 564, 32 Atl. 730.

²² In Missouri where the holder in due course has been allowed recovery where the sum payable was changed as a result of negligent execution, he has been denied recovery where the clause "with interest at ten per cent after maturity" was added at the end of the note. See the Missouri cases cited in footnotes 18 and 21.

²³ In *Holmes v. Bank of Ft. Gaines* (1898) 120 Ala. 493, 24 So. 959, where the note read "payable at Fort Gaines, Ga.," and the words "the Bank of" were inserted in the space between the words "at" and "Fort," the holder in due course was allowed to recover because "there was a careless execution of the note by leaving room for this insertion to be made without defacing the note."

But in *Cronkhite v. Nebeker* (1882) 81 Ind. 319, a case virtually identical with the Alabama case, the contrary result was reached.

²⁴ *Cruchley v. Clarence* (1813) 2 Mau. & Sel. 90; *Brummel & Co. v. Enders, Sutton & Co.* (Va. 1868) 18 Gratt. 873; *Putnam v. Sullivan* (1808) 4 Mass. 45.

²⁵ Alteration by filling formal blank spaces, maker liable to the holder in due course.

(a) Clauses providing for interest—*Winter & Loeb v. Pool* (1894) 104 Ala. 580, 16 So. 543; *Visher v. Webster* (1857) 8 Cal. 109; *Statton v. Stone* (1900) 15 Colo. App. 237, 61 Pac. 481; *Canon v. Grigsby* (1886) 116 Ill. 151, 5 N. E. 362; *Gillaspie v. Kelley* (1872) 41 Ind. 158; *Rainbolt v. Eddy* (1872) 34 Iowa 440; *Blakey v. Johnson* (Ky. 1877) 13 Bush 197; *Cason v. Grant County Deposit Bank* (1895) 97 Ky. 487, 31 S. W. 40; *Diamond Distilleries Co. v. Gott* (1910) 137 Ky. 585, 126 S. W. 131; *Weidman v. Symes* (1899) 120 Mich. 657, 79 N. W. 894; *Humphrey Hardware Co. v. Herrick* (1904) 72 Neb. 878, 101 N. W. 1016.

agreed as to the basis of the right. In some cases the result is based on negligence,²⁷ in others upon the doctrine of implied authority to fill.²⁸ Where the instrument contains qualifying clauses so situated that they may be detached without affecting the formal parts of the instrument, there is a similar conflict.²⁹

The question as to the effect of negligent execution more or less connected with a subsequent act of alteration by erasures seems to have been seldom raised. In Illinois it has been held that if one executes a negotiable instrument "written partly in ink, but containing a material condition, qualifying his liability, written only in pencil, he is guilty of gross carelessness, and if the writing in pencil is erased so as to leave no trace behind, or any indication of alteration, as it easily

(b) Clauses designating a place of payment—*Redlich v. Doll* (1873) 54 N. Y. 234.

²⁷ Alteration by filling formal blank spaces, maker not liable to the holder in due course.

(a) Clauses providing for interest—*Young v. Baker* (1902) 29 Ind. App. 130, 64 N. E. 54; *Conger v. Crabtree* (1893) 88 Iowa 536, 55 N. W. 335 (distinguishes *Rainbolt v. Eddy*, *supra*, footnote 25); *Derr v. Keaough* (1895) 96 Iowa 397, 65 N. W. 339; *Commercial Bank of Dawson v. Maguire* (1903) 89 Minn. 394, 95 N. W. 212; *First Nat. Bank v. Merkle* (1910) 97 Miss. 824, 53 So. 350; *Washington Savings Bank v. Ecky* (1873) 51 Mo. 272 (regarded by the court in *Capital Bank v. Armstrong*, *supra*, footnote 21 as having been overruled by *Briggs v. Ewart*, *supra*, footnote 3); *Hurlbut v. Hall* (1894) 39 Neb. 889, 58 N. W. 538; *Morehead v. Parkersburgh Nat. Bank* (1871) 5 W. Va. 74.

(b) Clauses designating a place of payment—*Charlton v. Reed* (1883) 61 Iowa 166, 16 N. W. 64; *Simmons v. Atkinson*, *supra*, footnote 21.

²⁸ *Statton v. Stone*, *supra*, footnote 25.

²⁹ *Redlich v. Doll*, *ibid*.

Alteration by detaching a clause, maker liable to the holder in due course—*Mater v. American Nat. Bank* (1896) 8 Colo. App. 325; *Cornell v. Nebeker* (1877) 58 Ind. 425; *Noll v. Smith* (1878) 64 Ind. 511; *Bank of Commerce v. Dillon* (1913) 37 Okla. 109, 130 Pac. 538; *Zimmerman v. Rote* (1874) 75 Pa. 188; *Brown v. Reed*, *supra*, footnote 3.

Alteration by detaching a clause, maker not liable to the holder in due course—*Scofield v. Ford* (1881) 56 Iowa 370, 373, 9 N. W. 309. But the court added, "While this is so, we are not prepared to say that under some circumstances the note thus altered by the severance of written qualifying provisions should not be deemed valid. If the maker were guilty of gross carelessness it may be that he ought to be precluded from setting up the invalidity of the note as against a *bona fide* holder for value."

Wait v. Pomeroy (1870) 20 Mich. 425; *Toledo Scale Co. v. Gogo* (1915) 186 Mich. 442, 152 N. W. 1046; *Stevens v. Venema* (1918) 202 Mich. 232, 168 N. W. 530; *Seebold v. Tatlie* (1899) 76 Minn. 131, 78 N. W. 967; *Bothell v. Schweitzer* (1909) 84 Neb. 271, 120 N. W. 1129; *Gerrish v. Clines* (1875) 56 N. H. 9; *Benedict v. Cowden* (1872) 49 N. Y. 396.

Rochford v. McGee (1903) 16 S. Dak. 606, 94 N. W. 695. In this case the clause detached was separated from the rest of the instrument by a perforated line along which the severance was made. The court intimated that where the detaching of the clause was facilitated by the maker's negligence, such act would not constitute a material alteration as against a holder in due course. But the facts of this case were thought not to constitute negligence.

Stephens v. Davis (1886) 85 Tenn. 271, 2 S. W. 382; *Spencer v. Tripplett* (Tex. Civ. App. 1916) 184 S. W. 712.

may be, we are of opinion, an innocent holder will take it discharged of any defense arising from the erased portion of the note, or from the fact of alteration."³⁰ This decision has been criticised in a Texas case³¹ where the court treated as a material alteration the erasure of a qualifying clause inserted with pencil. It has also been held in California³² that the erasure of the words and figures of the sum payable, which had been inserted with pencil, and the substitution of a greater amount constituted a material alteration. The possible implication from the Illinois case is that one, in order to guard against the consequences of negligent execution, would be required to keep up with the improvements in check paper, indelible inks and protectograph machines. In a recent North Carolina case³³ this high standard of care was seriously urged but very definitely rejected, the court saying:

"It would well-nigh withdraw these instruments from ordinary use, if any and every one who issues them without these precautionary devices (protectograph machines) would incur the risk of liability insisted on by plaintiff. . . . And what would be the standard of excellence required in the procurement and use of these protective devices? . . . It is admitted that the kind now in use do not afford complete protection, and it is well known that, day by day, the agents of these patent devices, enterprising and insistent, offer their wares, claiming that they have the very latest and only efficient protection. Doubtless, a bank should use these things when it has been shown that they lessen the risk of forgery. As a rule they do use them, but that is very far from the position that a failure to use them imports an actionable wrong."

The negligent execution cases are somewhat parallel to those where the maker, after complete or partial execution, is negligent in his custody of the instrument, as a result of which he loses possession and the instrument is negotiated by a convertor to a holder in due course. As regards the completed instrument, some of the cases at common law held that if negotiated by a party not intrusted with possession, the instrument would not be a valid contract in the hands of any holder.³⁴ Other

³⁰ *Harvey v. Smith* (1870) 55 Ill. 224, followed in *Seibel v. Vaughan* (1873) 69 Ill. 257.

In *Otis Elevator Co. v. First Nat. Bank* (1912) 163 Cal. 31, 124 Pac. 704, the court held that the drawee might charge the drawer's account on a check altered by erasures and substitutions where the amount was paid to an agent of the drawer. The case really decides that, on the facts of the case, the drawer was estopped to deny that his agent had authority to alter the check.

³¹ *Lanier v. Clarke* (1910) 63 Tex. Civ. App. 266, 133 S. W. 1093.

³² *Walsh v. Hunt* (1898) 120 Cal. 46, 52 Pac. 115.

³³ *Broad Street Bank v. Nat. Bank of Goldsboro* (1922) 183 N. C. 463, 112 S. E. 11.

³⁴ *Burson v. Huntington* (1870) 21 Mich. 415; *Salley v. Terrill* (1901) 95 Me. 553, 50 Atl. 896.

cases protected the innocent purchaser.³⁵ Section 16 of the Negotiable Instruments Law, by resorting to a "conclusive presumption" of delivery when the instrument is in the hands of the holder in due course, adopts the latter policy, and thus affords protection even where the instrument is stolen from the maker. The general principle here involved goes beyond the fraud in the inception cases, because legal liability is fastened upon the maker although his loss of possession was not due to a negligent act, although it is in harmony with the Connecticut and West Virginia view. Where an incomplete instrument was not delivered by the maker, but subsequently completed and negotiated by one not intrusted with possession, the maker's defense of non-delivery was available against the holder in due course,³⁶ but the contrary has been held where the instrument got into circulation more or less as a result of careless custody by the maker.³⁷ Section 15 of the Negotiable Instruments Law provides:

"Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery."

But it has been held that this section does not prevent an inquiry into the question of negligent custody of the instrument, and that if, as a result of such negligence, the instrument is stolen or otherwise converted by a wrongdoer, completed, and negotiated to a holder in due course, the latter is allowed to recover.³⁸

The cases where the maker or drawer executes a negotiable instrument and delivers it to one under mistake induced by fraud as to the

³⁵ *Clarke v. Johnson* (1870) 54 Ill. 296.

³⁶ *Baxendale v. Bennett* (1878) L. R. 3 Q. B. D. 525; *Nance v. Lary* (1843) 5 Ala. 370.

³⁷ See *Phillips v. Joy Co.* (1916) 114 Me. 403, 407, 96 Atl. 727. "The case seems to show quite clearly that the check book was left about the office in such a way that this check was in fact undoubtedly stolen.... Under all the circumstances it seems to us, in view of the character of the paper stolen, its condition as to signature when stolen, the negligence in leaving the signed checks in such environment that theft was easy, and the apparent care of the plaintiff before cashing the check, that we should apply the rule of estoppel noted in *Salley v. Terrill* (1901) 95 Me. 553, 50 Atl. 896." See *infra*, footnote 51.

³⁸ *Allen Grocery Co. v. Bank of Buchanan Co.* (1916) 192 Mo. App. 476, 482, 182 S. W. 777. In speaking of Section 15 the court said: "We think this section was not intended to abrogate or impair other well-recognized rules by which in certain instances delivery by the maker would be implied, either from authority actually conferred by him upon an agent or from conduct which should estop him from claiming that he had not delivered or authorized the delivery of the signed instrument." This construction of the section is weakened somewhat by the fact that the case arose between the drawer and drawee, although the court held that since the check honored was an over draft the drawee "should be regarded as an innocent holder for value and not as a debtor bank to a depositor."

identity of the payee, and those cases where, no fraud intervening, the instrument is sent to one of the same name as that of the intended payee under mistake as to the latter's address, are more remotely analogous to the cases heretofore considered because the issue concerns the legal title to the instrument rather than the question of the existence of the liability. In both types of cases conflicts of authority have developed.³⁹

In attempting to arrive at a just result in cases of this kind, it would appear proper to take into consideration the fact that, where a party to a negotiable instrument is held liable to the holder in due course in a case where he would not have been liable to the party with whom he dealt, the result is unjust as to him. The excuse for this personal injustice is because it is more important to society to stimulate the circulation of commercial paper than it is to award personal justice to a party who signs it. But no one has ever urged that the doctrine of bona fide purchase should be carried so far as to impose liability upon one whose name was forged or upon a maker of an instrument which has been materially altered. Causal relation between an act of the party and the existence of the instrument in the form sued on is indispensable. But there are many indispensable antecedents to every fact. The selection of one of them as the responsible cause is determined by considering many factors, prominent among which, in this group of cases, is the factor of business needs.

It is believed that the fraud in the inception cases have been wisely decided. The result follows from the idea that there is no contract unless a genuine signature is affixed under circumstances which charge the signer with knowledge of the consequences of his act. Where one knowingly signs his name, thinking that such act establishes some new legal relation between himself and another, but does not know that the instrument signed contains an unqualified promise to pay a sum of money, intention, at least in a subjective sense, is absent. Thus far he is freed from liability; but the operation of this rule is then restricted by holding that he will be liable on the instrument as actually signed if he were negligent in not acquiring the necessary knowledge. This is a wise modification. The acts or omissions which constitute the negligent conduct need not be looked upon as establishing a liability

³⁹ The impersonation cases are ably discussed in a note in (1920) 34 Harvard Law Rev. 76. Where a mistake was made in sending the instrument to one of the same name as the intended payee, see *Mead v. Young* (1790) 4 D. & E. 28; *Groves v. Am. Exchange Bank* (1858) 17 N. Y. 205; *Rhodes v. Jenkins* (1892) 18 Colo. 49; *Indiana Nat. Bank v. Holtsclaw* (1884) 98 Ind. 85; *White v. Springfield Institution* (1883) 134 Mass. 232; *Jung v. Second Ward Bank* (1882) 55 Wis. 364; *Beattie v. Nat. Bank* (1898) 174 Ill. 571; *State Bank v. The Mid-City Bank* (1921) 295 Ill. 599, 129 N. E. 428; *Weisberger Co. v. Savings Bank* (1911) 84 Ohio St. 21.

in the nature of a tort, but rather as a group of facts which establish the requisite knowledge or intention in an objective sense. If the requisite knowledge be regarded as a subjective element, then the negligent conduct operates as an estoppel to deny the execution of the contract, or as creating a power in the wrongdoer to subject the signer to liability by negotiation to an innocent holder. The origin of the power would rest in part upon the desire to protect the innocent purchaser, but principally upon the desire, founded upon business necessity, to stimulate the circulation of commercial paper, the protection to the buyer being a result of this general policy rather than the end in itself. Where the maker is not negligent he may properly be protected because there is no corresponding gain by holding him liable. The contention that "it is absolutely necessary to the protection of innocent holders of commercial paper" that the maker's liability should depend solely upon the genuineness of the signature and that "in such cases the question of negligence in the maker forms no legitimate subject of inquiry"⁴⁰ throws the emphasis on the wrong element. It is not the protection of the innocent holder which is of prime consideration, but the desire to so formulate the law that commercial paper will circulate freely. The position occupied by the holder in due course is, in the main, a result rather than a cause of this policy. Moreover, if this contention be taken to mean that business requires the result it is not borne out by the facts. There is no indication that negotiable paper circulates any more freely or that discount rates are any lower in West Virginia than in other states where the innocent purchaser is not given this degree of protection. If it be answered that there would be a substantial difference if the circulation of this kind of fraudulent paper greatly increased, a fair reply is that if conditions in this respect did so change there would be time enough then to increase the protection of the holder in due course.

In the usual material alteration case the maker is held not liable for substantially the same reason that protects him from liability on forged instruments. The majority of courts hold that the distinctive element of an alteration consists in any change, however effected, which makes the contract read substantially different from what it did at the time of its execution and delivery. Accordingly, a change may consist in the erasure of material parts and the substitution of other words, or in the insertion of additional words or in the detachment of clauses. The courts which impose liability upon the maker when the instrument is altered by insertions do so usually upon the ground that there is an

⁴⁰ See *Bank of Parkersburg v. Johns*, *supra*, footnote 10, at p. 535.

estoppel by negligence to set up the defense of material alteration.⁴¹ It is also possible to say that there is a duty on the maker to the holder to use care in the execution of negotiable instruments. The attack made upon these positions is that there is no estoppel because there is no representation, and that, while there may be a duty upon the drawer of a check to the drawee bank to use care, based upon the contract of deposit, there is no basis for the imposition of a general duty to any and all persons who may purchase the instrument. Moreover, it is urged that the maker cannot be liable because the loss was occasioned by the independent criminal act of the wrongdoer in making the alteration.⁴²

The estoppel argument may possibly justify those cases where blanks providing for interest rates or a place of payment are filled up without express authority and the maker is held liable thereon. But the contention of the majority that, where a completed instrument is altered by insertions, there is no estoppel seems sound. The further contention of the majority that there can be no duty of care to the holder because the criminal act of the wrongdoer breaks the chain of causation is not convincing. True, if the situation be looked at from the standpoint of its analogy to questions of causation in the law of torts the argument is strong, for the last wrongdoer is usually regarded as the responsible cause. The owner of a chattel may recover possession from a bona fide purchaser from a thief although his negligent custody of the property may have furnished the opportunity for the larceny. But this analogy proves nothing here, for it has been the law, at least since the days of Lord Mansfield, that the equity of ownership in a bearer instrument is cut off by negotiation to an innocent holder by a thief, and this without regard to its negligent custody by the owner. Moreover, the Negotiable Instruments Law now cuts off the equity of ownership of a maker of a bearer instrument, which had

⁴¹ *Yocum v. Smith*, *supra*, footnote 18. "If the negligence of one influences and induces an act whereby an innocent man is injured the culpable party must sustain the loss."

Trigg v. Taylor, *supra*, footnote 18. "...the loss ought to fall on the person in fault; according to the familiar rule, that when one of two persons must suffer by the act of a third, the one who affords the means to the wrongdoer must sustain the loss."

Garrard v. Haddan, *supra*, footnote 18, at p. 85. "The doctrine is but an elaboration of a great principle of justice, that if one by his acts, or silence, or negligence, misleads another, or in any manner effects a transaction whereby an innocent person suffers a loss, the blamable party must bear it."

⁴² *Bank v. Wangerin*, *supra*, footnote 19. "In order to estop one by the acts of another such other must be in some way clothed with an agency to act for the one sought to be estopped."

That the criminal act breaks the chain of causation, see especially *Fordyce v. Kosminski*, *supra*, footnote 16; *Knoxville Nat. Bank v. Clark*, *supra*, footnote 19; *Greenfield Savings Bank v. Stowell*, *supra*, footnote 19.

never become effective by delivery, when stolen and negotiated to a holder in due course. Also in the fraud in the inception cases, where the maker is held negligent and hence liable to the holder in due course, the criminal act of the payee, probably not larceny, but at least the obtaining of property by a confidence game or by false pretenses, has never been held sufficient to defeat the maker's liability, and yet there is here just as truly an intervening criminal act as there is in the alteration case. True in the fraud in the inception case the crime is committed by the party with whom the maker dealt, but this fact apparently is regarded as immaterial, because in the negligent execution cases the majority have never drawn any distinction between the consequences of an alteration by insertions by the original payee and by a subsequent holder. If the minority rule is unsound, it is not proven so by the argument that the intervention of the criminal act of a third party renders the maker not liable.

Is there a duty upon the maker to use care in the drawing of a negotiable instrument? It is not so difficult to find the basis for such a duty of a drawer of a check to the drawee bank, for it may be based upon the contract of deposit. True, such a term is not usually there in fact. It has sometimes been said that the drawee, by honoring the altered instrument, breaks his contract with the drawer, but that the drawer commits a tort by his negligent execution of the instrument, and that to prevent circuity of action the drawee is allowed to debit the account.⁴³ This seems an unnecessarily complicated explanation of a desired result. It may more reasonably be urged that the duty of the drawer of a check to the drawee to use care in drawing the instrument is placed upon him by law as an incident to the relation of banker and depositor.⁴⁴ The banker's risks are extensive as it is. If he pays an altered instrument he cannot charge the account of the drawer, and now under the Act, cannot recover from the party to whom it was paid.⁴⁵ If he happens to dishonor wrongfully he is liable to the drawer. In those cases where the alteration is by insertions caused by negligent execution, it is entirely just to give this slight compensation to the drawee bank. To do so brings this result into harmony with the cases which impose the duty upon the drawer to give notice of forgeries and alterations to the drawee, and in default thereof a liability to the drawee for the damage which could have been prevented by the notice.⁴⁶

⁴³ *Fordyce v. Kosminski*, *supra*, footnote 16.

⁴⁴ See *supra*, footnotes 16 and 17.

⁴⁵ *City Bank v. Bank of Republic* (1921) 300 Ill. 103, 132 N. E. 832.

⁴⁶ See an able article by Arant, *Forged Checks—The Duty of the Depositor to His Bank* (1922) 31 Yale Law Journ. 598.

Assuming that the estoppel argument does not justify the minority rule and that the criminal intervention of a third party does not destroy it, is there still any basis for establishing a duty on the maker to the holder? Or, to put the inquiry otherwise, should the acts and omissions of the maker or drawer in so drawing the instrument that, without erasures, it may be altered by the insertion or detachment of words, figures or clauses, operate to confer a power upon the wrongdoer to impose liability upon the maker or drawer to the holder in due course? If there is such a duty or power there must be strong reasons for creating it, for it should not be lost sight of that, if the liability is imposed, the maker, in many cases, is forced to pay an amount greatly in excess of that which he agreed to pay; and in the detachment cases he would often be held liable upon a negotiable instrument when the instrument as originally drawn was clearly non-negotiable and qualified the maker's duty to pay. It should also be recalled that the rule protecting the innocent purchaser developed at a time when, as a rule, he was not permitted to recover upon the instrument as originally drawn, but that under the Negotiable Instruments Law in all cases of material alteration the holder in due course "may enforce payment thereof according to its original tenor."⁴⁷ This is a wise reversal of policy, and the present rule, while technically having nothing to do with the question here raised, may quite properly be taken into consideration in determining the extent of the maker's liability in this type of alteration case. Moreover, from a practical standpoint, the opportunity for the holder in due course to obtain reimbursement is more easily availed of and more certain than is the right of the maker to obtain restitution, because the holder's rights are against all prior indorsers, even qualified indorsers and his transferor by delivery, on the theory of warranties, while the maker's right runs only against the wrongdoer, whom he must first discover, to find, all too frequently, that his right is valueless because of the latter's insolvency. There is also a good deal to be said in favor of the observation that it is asking too much to expect all classes of persons to so draw their negotiable instruments as to prevent alterations by insertions. The business or professional man will usually draw his checks and notes in proper form, but those who use commercial paper only occasionally will be less likely to do so. The rule therefore works a hardship upon those least able to stand it. The minority rule, when pushed to an extreme would, in certain cases, impose a liability even upon those accustomed to the daily drawing of negotiable paper. A check dated, for example, on the 2nd, would very seldom be so drawn as to prevent the insertion of a figure either

⁴⁷ N. I. L. § 124.

before or after the date specified. This change would materially affect the liability of the drawer, particularly so in the event of the insolvency of the drawee bank. It would be somewhat illogical to say that the drawer would not be negligent in this case, because the basis of the rule is that it is negligence to so draw the instrument that it may be altered by insertions. The position of the holder in due course and his individual claims to protection are not of themselves sufficiently strong to justify the imposition of the liability.

These objections might, however, all be waived aside and the maker held liable in spite of the injustice to him if there is any urgent reason based upon business necessity. There is no insuperable theoretical difficulty in the establishment of a power in the wrongdoer to alter the maker's liability. Wrongdoers frequently possess the power to change the legal relations of others. Nor is it necessary to go beyond the law of negotiable paper to find them. Indeed it is quite possible that a thief of bearer paper has legal title.⁴⁸ The only question is whether there is justification for the creation of the power; but it is difficult to observe any such necessity. For many years both rules have been in operation and yet there is no indication that there has been any corresponding gain to business in those states where the maker is held liable, nor does it appear that the circulation of commercial paper is at all impeded in those states where the maker is allowed to defend. The rates at which it may be purchased seem unaffected by either rule—a circumstance entitled to consideration in determining what the rule should be.

It is not necessary to urge that under no circumstances should negligent drawing operate as a basis of liability, for cases may be supposed where perhaps there should be liability.⁴⁹ When an instrument in form negotiable is barely attached to another paper containing qualifying clauses, or to the same paper separated by perforations almost severed at the time of delivery, and perhaps where formal blanks for the rate of interest or the place of payment or attorneys' fees are left unfilled, the maker might be held liable in the former case because of negligence and in the latter upon the basis of implied authority to fill. But in the insertion case no such reason appears.

⁴⁸ See Professor Chafee's exhaustive analysis of *Rights in Overdue Paper* (1918) 31 Harvard Law Rev. 1104.

⁴⁹ *Scofield v. Ford*, *supra*, footnote 29. After holding that the severance of a memorandum from a note constituted a material alteration the court said: "While this is so, we are not prepared to say that under some circumstances the note thus altered by the severance of written qualifying provisions should not be deemed valid. If the maker were guilty of gross carelessness it may be that he ought to be precluded from setting up the invalidity of the note as against a *bona fide* holder for value."

Where the alteration is accomplished by erasures and insertions there is still less reason for holding the maker liable. Indeed, no case has been found where this result was reached; but the Illinois case, holding the maker liable upon an instrument from which had been erased a qualification written in pencil, closely approaches it. One of the objections that can be raised to the minority rule is that it involves the principle under which it might properly be held negligent to draw the instrument with materials rendering erasure easy, or negligence not to use the most improved paper, indelible inks and the most improved types of protectograph machines. Such a policy would unduly restrict the circulation of commercial paper.

Delivery by the maker is a condition precedent to his liability to holders not in due course. At common law there was a conflict of authority as to whether delivery was a requisite as against the holder in due course both as regards complete and incomplete instruments.⁵⁰ The cases are not numerous. Those states which held that delivery would be dispensed with when the instrument was in the hands of the innocent purchaser, of course, were not concerned with negligent custody. Liability was fastened upon the maker because he did not prevent the instrument from getting into circulation. And this policy, as regards completed instruments, was adopted by the Negotiable Instruments Law.⁵¹ Where delivery was held essential to liability to the bona fide purchaser it was held in Maine that where the instrument, complete or incomplete, got into circulation as a result of the maker's negligent custody, he would be liable to the holder in due course.⁵² This seems a just result. To shut off the defense of non-delivery entirely gives the innocent purchaser more protection than he is fairly entitled to, and to make it available no matter how careless the maker had been with the instrument puts too high a premium on negligence. If delivery, both of completed and incomplete instruments were, in the first instance, made a requisite, but this condition precedent dispensed with when the instrument got into the hands of the holder in due course as a result of the careless manner in which it was kept by the maker after

⁵⁰ See *supra*, footnotes 34, 35, 36 and 37.

⁵¹ N. I. L. § 16.

⁵² *Salley v. Terrill*, *supra*, footnote 34. This case cites and follows *Burson v. Huntington*, *supra*, footnote 34, but confines the rule to instances where there was no negligent custody of the instrument. The court said: "There may be such gross carelessness or recklessness of the maker in allowing an undelivered note to get into circulation as will justly estop him from setting up non-delivery, as if he were knowingly to throw it into the street, or otherwise leave it accessible to the public, with no person present to guard against its abstraction under circumstances where he might reasonably apprehend that it would be taken."

This rule was applied to incomplete instruments in *Phillips v. Joy Co.*, *supra*, footnote 37.

execution, the rule would then be in harmony with the fraud in the inception cases, as it is believed it should be. Execution and delivery make the contract. Normally this means intentional execution and intentional delivery. But if negligent execution fulfills the requirement, negligence resulting in the instrument's getting out of hand should be given like effect. And in this respect the rule might well be applied to both completed and incomplete instruments. Under Section 16 of the Negotiable Instruments Law, dealing with the non-delivery of completed instruments, it is, of course, impossible to make negligent custody the test. Section 15, dealing with incomplete instruments, adopts just the opposite policy. Under a literal interpretation this section makes the defense of non-delivery available in all cases, though it has been held that the defense is not open when the maker's negligent custody contributed to the instrument's getting into circulation.⁵³ On this matter a contrary construction is quite possible. As far as the right of the drawee bank is concerned, both as regards completed and incomplete instruments and irrespective of the drawer's negligence, the drawee should be privileged to debit the account of the drawer just as in the case of negligent drawing. In reality the contract of deposit or the relation of banker and depositor controls here, the Negotiable Instruments Law not being involved.

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⁵³ See *supra*, footnote 38.